

No. 14,805

United States Court of Appeals  
For the Ninth Circuit

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AMERICAN PACIFIC DAIRY PRODUCTS, INC.,  
a corporation, *Appellant,*

vs.

JOSEPH A. SICILIANO, *Appellee.*

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JOSEPH A. SICILIANO, *Appellant,*

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC.,  
a corporation, *Appellee.*

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PETITION OF APPELLEE JOSEPH A. SICILIANO  
FOR A REHEARING.

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FILED

JUL 20 1956

PAUL P. O'BRIEN, CLERK



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*To the Honorable William Denman, Chief Judge, and  
to the Honorable Associate Judges of the United  
States Court of Appeals for the Ninth Circuit:*

The petitioner respectfully requests a rehearing in the above-entitled cause and that the decision be modified as hereinafter suggested for the reasons and upon the grounds following, to-wit:

1. That this Honorable Court, as part of its opinion heretofore issued on the 20th day of June, 1956, did find as follows:

“Siciliano argues that he is entitled to a share of the profits earned by the ice cream business on Guam from July 1, 1953, the date of dissolution, until Products Co. settles accounts rather than merely the interest the district court awarded for the use of his capital and profits. Section 2436 of the Guam Civil Code provides:

‘When any partner retires . . . and the business is continued under . . . the conditions set forth in . . . Section 2432 (b) without any settlement of accounts as between him . . . and the person . . . continuing the business, unless otherwise agreed, he . . . as against such persons . . . may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option . . . in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership . . .’

This Court has previously construed this section of the Uniform Partnership Act. In *Moseley v. Moseley*, 196 F. 2d 663, 666-667 (Cir. 9, 1952), we held that

‘The right of election which appellant has . . . (under this section of the Uniform Partnership Act) . . . is one which he should be permitted to exercise after an accounting shall have been taken of the earnings subsequent to dissolution. Otherwise, the right of election would be an illusory one.’

The district court ordered no such accounting in this case, and no determination was made as to

‘the rights attributable to the use of . . . (Siciliano’s) . . . right in the property of the dissolved partnership’ . . .

The district court erred in not ordering an accounting of the profits earned by the ice cream business on Guam from July 1953 to the date of its judgment.”

2. That petitioner Joseph A. Siciliano, respectfully contends that the judgment of this court should be modified to provide that there be an accounting of the profits earned by the ice cream business on Guam to the date American Pacific Dairy Products, Inc., settles accounts with petitioner, rather than merely to the date of the judgment in the court below, for the reason that the American Pacific Dairy Products, Inc., has continued to use the partnership property through the trial and through this appeal and will still continue to use the same during such further proceedings as may be required in the court below.

3. That a miscarriage of justice will occur if the judgment of this court is not so modified since Section 2432 (b) of the Guam Civil Code, as quoted by the Court and as construed by the cases, requires that there be an accounting of profits until the final accounts have been settled between the parties, because until such settlement and payment therefor has been made, profits earned by the business are attributable in part to the property of the withdrawing partner in the partnership business, and any other construction of the statute would place a premium on delay in the final settlement of accounts and winding up of

the partnership business to the advantage of the remaining partner and to the detriment of the withdrawing partner.

In construing a similar statute, the California court in *Vangel v. Vangel* (cited by this court in its opinion) held as follows:

“ . . . (16) Furthermore, it appearing from the briefs and from the oral argument that the status quo with respect to the partnership operations has remained unaltered during the pendency of this appeal, defendant is entitled to his proportionate share of any profits which have accrued from the employment of his property in the business of the partnership while awaiting the final outcome of this appeal. (Clark v. Jones, 50 Cal. 425.) ”

The case of *Moseley v. Moseley* decided by this court and cited in its opinion in the case at bar appears also to sustain petitioner's contention herein.

Wherefore, petitioner respectfully submits that a rehearing should be had upon the issues presented by this petition and that the judgment be modified accordingly.

Dated, Agana, Guam,

July 17, 1956.

JOHN A. BOHN,

WALTER S. FERENZ,

*Attorneys for Appellee*

*and Petitioner*

*Joseph A. Siciliano.*

## CERTIFICATE

The undersigned, counsel for the said Appellee in the above and foregoing cause, certifies as follows:

(1) That in his judgment, the above and foregoing petition is well founded; and

(2) That it is not interposed for delay or harassment.

Witness my signature on this 17th day of July, 1956.

JOHN A. BOHN.

